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Municipal Corporations—Municipal Borrowing

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their chattels. The situation here, they urged, is analogous; the closing of the street terminated the franchise and the utilities' sole right should be to remove their property.²⁵

Municipal Borrowing

Like the other incidents of local government, the power to borrow money and contract indebtedness is not inherent, nor can it be exercised unless it is conferred either expressly or by necessary implication.²⁶ In New York State the power is expressly granted to municipalities by the State Constitution.²⁷ Although there is some trend toward pay-as-you-go financing by local units, millions of dollars of capital improvements are financed by bond issues. At the present time, because of the tax-free nature of income from municipal bonds,²⁸ this borrowing is accomplished at very favorable interest rates.²⁹ Such was not always the case, however, and there are still municipal bonds in the hands of investors at interest rates of four to six percent and higher. Obviously, it is to a municipality's advantage to pay off these obligations if it is financially and legally able to do so, thus saving the interest cost.

In 1908 the City of Buffalo issued water bonds aggregating \$500,000 for a 50 year term at 4% interest. These bonds were by their terms callable by the city "at the expiration of 20 years from the date of issue." The obligations were clearly callable in 1928. The question whether they were callable only then or at any time thereafter was before the Court in *City of Buffalo v. Strong & Co.*³⁰ The city sought a declaratory judgment that it had a right to call the bonds; the bondholders contended that the terms of the bonds gave the city an option to call them which had to be exercised upon a "pin-pointed" day, or at the most within a reasonable time after that day. The majority of the Court, finding this argument of the bondholders to be unreasonable, examined the

25. For another case involving condemnation, see *Delaware County Electric Co-operative v. City of New York*, 304 N. Y. 196, 106 N. E. 2d 605 (1952), which turns upon the construction of a lease in which the utility had agreed to limitations on the City's liability under the ADMINISTRATIVE CODE, Title E, Chap. 15.

26. McQUILLIN, *op. cit.*, § 39.07.

27. Art. VIII.

28. INT. REV. CODE § 22(b)4.

29. So important a factor is this tax advantage that LOCAL FINANCE LAW §§ 58:00, 59:00 now provide that a municipality requesting bids may give the bidder the right to refuse to accept delivery if the income tax regulations change.

30. 304 N. Y. 132, 106 N. E. 2d 217 (1952).

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enabling act which authorized the bond issue.³¹ Although prior legislation³² had used the language "at any time after the expiration of 20 years," whereas this act used "at the expiration of 20 years," the Court found that no change of substance was intended and held for the city. In a strong dissent by Judge Dye, Conway and Froessel, JJ., concurring, it was contended that the question was more properly one of contract law. The dissenters, urging that there was no ambiguity in the instruments, argued that there should be no reformation in the absence of mutual mistake or fraud.

It is interesting to note that although most of the purposes for which municipalities are authorized to contract indebtedness contemplate capital improvements, there is at least one purpose authorized in this state which goes beyond that. Local Finance Law §10:00 authorizes municipalities to contract indebtedness for the payment of judgments.³³ One way in which such judgments may arise, obviously, is out of tort liability. Tort liability is elsewhere discussed and is not within the province of this subdivision; all that will be mentioned here, therefore, is a feature peculiar to municipalities.

Municipal Tort Liability

Under the common law citizens had no right to bring suit against a municipal corporation for alleged negligence in the performance of a governmental function.³⁴ Such a right was not and is not guaranteed by constitutional provision, but is statutory in origin.³⁵ As the Legislature might have withheld the right, it may in granting it impose such conditions as are deemed fit. This was the reasoning of the Court in deciding an appeal on constitutional grounds by a claimant allegedly injured by the negligence of the board of a school district, its agents and employees.³⁶ Section 50-e of the General Municipal Law requires as a condition precedent to the bringing of a tort action against a municipal corporation the service of a notice of claim upon the corporation within

31. L. 1907, Chap. 724.

32. L. 1906, Chap. 203, an earlier enabling act.

33. The maximum period for which such indebtedness may be contracted is ten years, LOCAL FINANCE LAW §11:00 (33). Municipalities are also authorized to pay a judgment by a budget note. LOCAL FINANCE LAW §29:00.

34. *Bailey v. City of New York*, 3 Hill 531 (N. Y. 1842).

35. COURT OF CLAIMS ACT §8; *Bernardine v. City of New York*, 294 N. Y. 361, 62 N. E. 2d 604 (1945).

36. *Brown v. Board of Trustees of Town of Hamptonburg, School District 4*, 303 N. Y. 484, 104 N. E. 2d 866 (1952).